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Adair Express L.L.C. and Package & General Utility Drivers, Local No. 396, International Brotherhood of Teamsters, AFL-CIO. Cases 31-CA-24291 and 31-CA-24484

September 21, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On June 18, 2001, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel and the Charging Party each filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Adair Express, L.L.C., take the action as set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"2 (a) Within 14 days from the date of this Order, offer Craig Smith, Rolando Estrada, Jofre Macoy, Eddie Zamora, Gary Bailey, Gerardo Lachica, and Mario Rodriguez reinstatement to their former jobs or, if those

¹ The Respondent has not filed any exceptions. The General Counsel has excepted to the judge's description in the recommended Order of the affected bargaining unit, which is inconsistent with the unit description contained in his decision. The General Counsel has also excepted to the language in the recommended Order regarding posting of the notice on the basis that it is incomplete. We find merit in these exceptions and modify the Order accordingly. We also make the parallel changes to the notice. With regard to the notice, the General Counsel has excepted to the effective date of the make-whole remedy as being inconsistent with the stipulated facts and the judge's analysis. We shall modify the notice to reflect the proper date.

The Charging Party has excepted to the absence of an affirmative bargaining order. The judge's recommended Order, however, includes an affirmative bargaining order and, therefore, we find this exception to be without merit.

Finally, we shall modify the judge's recommended order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed

"2 (b) Make Craig Smith, Rolando Estrada, Jofre Macoy, Eddie Zamora, Gary Bailey, Gerardo Lachica, and Mario Rodriguez whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the following for paragraph 2(d).

"2 (d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the following for paragraph 2(e).

"2 (e) Within 14 days after service by the Region post at its Van Nuys, California location copies of the attached notice marked Appendix.² Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 10, 2000."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 21, 2001

Peter J. Hurtgen,

Chairman

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT refuse to hire job applicants because they participated in the Union's organizing or because of their union affiliation or otherwise discriminate against employees to avoid having to recognize and bargain with the Union.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

Included: All full time and regular part-time drivers employed by Adair Express L.L.C. at 15041 Keswick Street, Van Nuys, California.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Craig Smith, Rolando Estrada, Jofre Macoy, Eddie Zamora, Gary Bailey, Gerardo Lachica, and Mario Rodriguez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent

positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Craig Smith, Rolando Estrada, Jofre Macoy, Eddie Zamora, Gary Bailey, Gerardo Lachica, and Mario Rodriguez whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them, less any net interim earnings, with interest.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed document.

WE WILL, on request of the Union, rescind any changes from terms and conditions of employment that existed immediately prior to our takeover of the predecessor, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about January 10, 2000.

ADAIR EXPRESS L.L.C.

Ann Cronin-Oizumi, Esq., for the General Counsel.

Bruce D. May, Esq. (Stradling, Yocca, Carlson, & Rauth) of Newport Beach, California, for the Respondent.

Jim Smith, of Covina, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Los Angeles, California, on August 21-23 and September 15, 2000, based on charges by the Package & General Utility Drivers, Local 396, International Brotherhood of Teamsters, AFL-CIO in Cases 31-CA-24291 and 31-CA-24484, filed on January 11, 2000, and April 28, 2000, respectively. The consolidated complaint which issued on May 25, 2000, alleges that Adair Express L.L.C., the Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Section 151 et seq. (the Act). More specifically, the complaint alleges that the Respondent refused to offer employment to several individuals because of their union activities and that the Respondent refused to bargain collectively and in good faith with the Union, in violation of Section 8(a)(1)(3) and (5) of the Act.

The Respondent filed a timely answer, denying the commission of any unfair labor practices.

Based on my observation of the witnesses and my consideration of the entire record in this case, including briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Adair Express L.L.C., an Arizona corporation, with an office and place of business at 15041 Keswick Street, Van Nuys, California, is in the trucking business, providing local delivery for, among others, Airborne Express. With services valued in excess of \$50,000 for, among others, Airborne Express, an entity directly engaged in interstate commerce and, with gross revenues in excess of \$250,000, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As of January 10, 2000, the Respondent, Adair Express, L.L.C., succeeded to the operation of a company known as, Assured Transportation & Delivery, Inc. (ATD) which provided delivery services for Airborne Express. Adair continued ATD's services in the same facility and hired several of ATD's drivers.

In September 1999, the Union commenced an organizational drive among the drivers employed by Respondent's predecessor, ATD. The campaign progressed to a filing of a petition with the Board on November 9, 1999, and to a stipulation on November 23, 1999, between the parties agreeing to an election to be held on December 13, 1999 (GC Exh. 4).

Among the 22 eligible voters, 12 voted in favor of union representation and no one voted against the Union (GC Exh. 5). The Union was certified on December 22, 1999, at ATD for the following unit of employees for purposes of collective bargaining within the meaning of Section 9(b) of the Act (GC Exh. 6):

Included: All full-time and regular part-time drivers employed by Adair Express L.L.C. at 15041 Keswick Street, Van Nuys, California.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

As a result of this scenario, the Respondent's conduct with respect to the Union is under scrutiny. The question to be resolved are whether Adair is a successor to ATD for purposes of union recognition and whether the Respondent violated the Act by refusing to hire certain former employees of ATD.

The facts of this case are based, inter alia, on a stipulation, signed on August 21, 2000 (GC Exh. 2):

IT IS HEREBY STIPULATED by and among Adair Express, L.L.C. (Respondent); Package & General Utility Drivers, Local No. 396, International Brotherhood of Teamsters, AFL-CIO (the Charging Party or the Union); and Counsel for the General Counsel of the National Labor Relations Board, as follows:

1. (a) Since January 10, 2000, Respondent, an Arizona limited liability company, has been engaged in the trucking business and has provided local delivery by van or

truck for Airborne Express, with an office and place of business located at 15041 Keswick Street, Van Nuys, California.

(b) Respondent, in conducting its business operations described in subparagraph 2(a) above, annually provides services valued in excess of \$50,000 to Airborne Express, an entity that is directly engaged in interstate commerce.

2. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. From at least January 1, 1997, through on or about January 9, 2000, Assured Transportation & Delivery, Inc. (ATD) provided services to Airborne Express at its facility located at 15041 Keswick Street, Van Nuys, California.

4. On January 10, 2000, Respondent began to provide services to Airborne Express out of the 15041 Keswick Street, Van Nuys, California facility formerly used by ATD through January 9, 2000.

5. On January 10, 2000, Respondent began to provide services to Airborne Express out of the 15041 Keswick Street, Van Nuys, California facility formerly used by ATD immediately after ATD ceased providing such services to Airborne Express, without any hiatus in the operation of providing such services to Airborne Express.

6. Since January 10, 2000, Respondent has continued to provide the same services to Airborne Express as the services previously provided by ATD, in basically the same form, and from the same facility as that used by ATD, the facility located at 15041 Keswick Street, Van Nuys, California, on 11 of the approximately 17 delivery routes previously serviced by ATD.

7. Commencing on January 10, 2000, the following individuals held the positions set forth opposite their respective names, and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Martana Foltz	Co-Owner
Keith Moore	Co-Owner
Chris Woods	Supervisor
Eric (Vincent) Quijano	Supervisor
Jorge Garcia	Supervisor

8. The following persons listed in Groups A and B below were employed as drivers by ATD beginning on the dates listed for each below and continuing through on or about January 9, 2000.

Group A

(All are alleged discriminatees herein)

Gary Steven Bailey	May 11, 1998
Rolando Estrada	April 15, 1997
Gerardo M. Lachica	January 16, 1998
John A. Macoy	March 17, 1995
Craig Smith	April 1, 1995
Mario Rodriguez	August 24, 1999
Eddie Cesar Zamora	September 23, 1997

Group B(All were hired by Respondent effective January 10, 2000)

Charles Hernandez	March 26, 1998
Henry Hernandez	December 8, 1998
Muhammad Shazrill Johanni	September 16, 1999
Michael Lamont Moore	June 21, 1999
Mario Wilson Torres	August 4, 1999
Bobbie Jean Varela	September 28, 1999

9. On January 10, 2000, Respondent employed about 14 drivers, including 6 drivers employed by ATD on about January 9, 2000 (named in para. 8 above, Group B), and about 8 drivers not employed by ATD during the period immediately before January 10, 2000.

The stipulation also provided for the admission of certain relevant documents as exhibits.

ANALYSIS

The new company, Adair Express, is clearly a successor to the predecessor, ATD, under the criteria set forth in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Summarizing those criteria, in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the court stated as follows:

This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.” *Golden State Bottling Co. v. NLRB*, 414 U.S. at 184. Hence, the focus is on whether there is “substantial continuity” between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S. at 280, fn.

4. It is uncontested that ATD discontinued its operation with Airborne Express at the Van Ways facility because of the Union. Adair submitted bids to Airborne and was successful in obtaining 11 of the 17 routes, which had been operated by ATD. Like ATD, Adair contracted with Airborne to service the routes previously owned by ATD. In addition, Adair hired ATD’s supervisors, Vincent Eric Quijano and Christopher Wood; it also hired six of ATD’s drivers. Adair operated out of ATD’s former facility and employed the same dispatchers. Like ATD’s drivers, Adair’s drivers wear Airborne uniforms. They also drive vans marked with Airborne’s logo. Adair began its operation on January 10, 2000, on a Monday night after ATD had ceased its business on Sunday, January 9, 2000. Accordingly, there was no interruption in the service. While the Respondent had fewer routes than ATD, the geographic area was essentially the same. Under these circumstances, where the record so clearly shows that there is a substantial continuity

between the employing enterprises, it is obvious and I find that the Respondent must be considered a *Burns* successor.

The implications of the successor status were explained as follows in *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795 (1 Cir. 1995):

Generally, a successor employer has the right to operate its business as it wishes. See *Elastic Nut Shop Div. of Harvard Ind. v. NLRB*, 921 F.2d 1275, 1279 [135 LRRM 32571] (D.C. Cir. 1990) (citing *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287–288 [80 LRRM 2225] (1972)). Within this prerogative is the successor’s freedom to hire its own work force: “nothing in the federal labor laws ‘requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor . . .’” *Id.* (quoting *Howard Johnson Co. v. Detroit Local Executive Board*, 417 U.S. 249, 261 [86 LRRM 2449] (1974) (citation omitted)). The successor employer may not, however, discriminate against union employees in its hiring. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 [125 LRRM 2441] (1987) (citations omitted).

Thus, where a successor employer refuses to hire its predecessor’s employees because of their union affiliation, it may violate §8(a)(3), 29 U.S.C. §158(a)(3). The test is as follows: If it is proved that the former employees’ protected conduct was a substantial or motivating factor for the successor’s refusal to hire, the refusal to hire violates §8(a)(3), 29 U.S.C. §158(a)(3), unless the successor proves by a preponderance of the evidence that it “would have taken the same action for wholly permissible reasons.” *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 [113 LRRM 2857] (1983). See also *Elastic Stop Nut Div. of Harvard Ind.*, 921 F.2d at 1280; *Horizon Air Services, Inc.*, 761 F.2d at 27. “[I]f the employer [refuses to hire] an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that [it] proffers are pretextual, the employer commits an unfair labor practice.” *Transportation Management Corp.*, 462 U.S. at 398.

In this regard, the record shows that the Respondent refused to hire seven former employees of ATD who were known to certain members of management as union adherents. The hiring decisions for the new company, Adair Express, were made by the new owner, Marlana Foltz. She relied on the advice of Christopher Wood, manager, and Vincent Quijano, assistant manager. During their tenure as supervisors at ATD, Supervisors Wood and Quijano were opposed to the union drive from its inception in September 1999. They used their managerial positions to persuade the employees to vote against the Union. For example, Wood testified that he spoke to the drivers about the Union almost constantly or like every day. He admitted that he knew which driver supported the Union as well as those who were opposed to the Union. According to Wood, the strongest supporters were Mario Rodriguez and Rolando Estrada. Wood also testified that ATD did not want to spend the money to fight the Union or to negotiate with the Union, and that he knew that they would be canceling the contract with

Airborne. He also told several drivers that they should postpone the union election until after everybody knew what ATD would do about its contract. Wood denied being concerned about losing his own job because of the union campaign. He explained that he and Quijano, along with two other drivers, had made a bid for the ATD routes. He learned that his bid was unsuccessful, on about January 3 or 4 when Marlana Foltz was announced as the winning bidder. On January 5, Wood learned that Foltz decided to retain him as an employee and as the manager for her new company. According to Wood, Foltz and Wood met several times for lunch and discussed each driver, but Wood denied ever speaking to Foltz about the Union or mentioning to her who among the drivers were the union supporter. Indeed, Wood testified that Foltz informed him that she was not interested in hearing about the Union.

The other supervisor at ATD who was retained by Adair Express as the assistant manager was Vincent Eric Quijano. Quijano similarly testified that during the union campaign, he would speak about the Union with the drivers of ATD on a daily basis and that he knew the identities of the principal union supporters, such as Rolando Estrada. He also knew and identified the drivers who opposed the Union. Like Wood, Quijano confirmed that ATD had canceled its contract with the Airborne because of the union campaign. He testified that he was afraid of losing his job at ATD because of the Union. On December 13, 1999, during the union election, Quijano admittedly observed the area where the election took place. He testified that he saw and observed the drivers as they came into the area to vote. He denied spying on the election, because, in his words, he already knew who was for and who was against the Union. Quijano conceded that he blamed the Union and the drivers who supported the Union for ATD's decision to cancel its contract. He testified that he was angry about it.

The ultimate hiring decisions were made by Marlana Foltz, the new owner of Adair Express. In her testimony, Foltz admitted that she discussed the drivers with Wood and Quijano. Foltz testified that she learned on December 29, 1999, that her bid was accepted by Airborne. But the drivers did not learn of the new employer until January 5, 2000, when Wood and Quijano informed the employees at a pizza party on the same day that they could fill out application forms for the new company. The Respondent hired a total of 14 drivers. Of those, six were former drivers of ATD. They were Charles Hernandez, Henry Hernandez, Muhammad Shez¹ Johanni, Mario Torres, Mike Moore, and Bobbie Valera. All except Torres had opposed the Union during the union campaign. Torres had voted for the Union, but he had subsequently signed an antiunion petition circulated by Bobbie Valera. Foltz also hired eight employees as drivers who had no prior connection with ATD. Many of them were inexperienced and required training, because they had never worked as drivers. They were: Jorge Lavin, Larry Page, Larry Steinberg, Robert McQuitty, James Mock, and Roland Bastion. However, Foltz refused to hire seven former ATD drivers, ostensibly because of certain deficiencies conveyed to her in her discussion with Wood and Quijano.

The drivers formerly employed by ATD, who were not hired were Rolando Estrada, Gary Steven Barley, Geraldo M. Iachica, Craig Smith, Mario Rodriguez, Eddie Zamora, and Jofre² Macoy. Foltz testified that she did not know that the seven had supported the Union. Indeed, Foltz testified that she did not think it [the union campaign] had anything to do with me. She also testified that she was totally unaware that the six ATD drivers whom she hired were antiunion, or that the seven who were not hired were prounion. Foltz also testified that she had never operated a business with a union in the picture.

The Respondent accordingly argues that the record does not contain a shred of evidence that Marlana Foltz ever displayed any antiunion bias and that she is a simple business person who walked into a hornet's nest caused by ATD's antiunion campaign and that she made honest decisions in a hurry about the best qualified drivers which had nothing to do with protected activities.

Foltz impressed me as a courageous and well meaning entrepreneur, but she did not strike me as unsophisticated and certainly not so naïve, as to intentionally avoid being informed by her managers about the very reasons for the predecessor's decision to discontinue its operations. She testified that she had been affiliated with Airborne Express for 13 years and had worked in the trucking business for 20 years.

In short, the Respondent hired six of the former ATD drivers, all of whom were known to Wood and Quijano to be opposed to the Union. The Respondent refused to hire seven of the former ATD drivers, all of whom had voted for the Union or had refused to sign the antiunion petition. Instead, the Respondent hired a number of employees who were totally inexperienced and required training by either Wood and Quijano. Moreover, six of the recently hired employees who had not come from ATD left their jobs already after 1 or 2 days and were gone by January 11, 2000. In spite of this uncontested scenario, the Respondent refused to hire any of the seven former ATD drivers and insists that the Union played no role in the hiring decision. Instead, the Respondent advanced certain deficiencies of the discriminatees that Wood conveyed to Foltz as reasons for the Respondent's refusal to hire them. The record, however, convinces me otherwise, these deficiencies were pretextual and not the true reasons for Respondent's conduct. Not only is the Respondent's scenario incredible, it is also implausible and unconvincing. In *Glenn Trucking Co.*, 332 NLRB No. 87 (1999), the Board found blatant disparity in the Respondent's treatment of the applicants and agreed with the judge that "the possibilities of the Respondent's lawfully filling . . . vacancies without hiring one employee on the Union's 'Preferential Hiring List' are at minimum statistically remote," and his further finding that "[t]he extreme [Union versus non union hiring] ratios clearly demonstrate animus against the employees" who were union supporters. There, as here, the Respondent's reasons for its refusal were pretextual. I accordingly find that the General Counsel met the initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1 Cir. 1981), cert. denied 455 U.S. 989 (1982), with respect to the Respondent's refusal to hire the named discriminatees.

¹ Also referred to as Shazrill.

² Also referred to as John.

My conclusions in this regard are supported by the antiunion campaign at ATD by Wood and Quijano, such as warning drivers repeatedly that the Union would make it too expensive for ATD to continue its operations and that it would be unable to pay union wages, and by trying to persuade the drivers to accept ATD's proposal to change their employee status into that of independent contractors. The Respondent concedes that Wood and Quijano carried on ATD's antiunion campaign, albeit under the direction of ATD, stating that the antiunion campaign was foisted on Wood and Quijano by ATD . . . [that] Wood and Quijano never had such designs . . . [and] no personal bias against the Union (R. Br. at 3). The record, however, shows that the two managers, in anticipation of the new ownership, encouraged at least two drivers to sign the antiunion petition, which Bobbie Valera had drafted. For example, Jofre Macoy, a driver, testified that on January 5, 2000, he was about to fill out his application for Adair when Wood approached him at the scanning room and said that if he signed the petition, showing that he had no union affiliation, he could keep his job with the new company. Another driver, Eddie Zamora, similarly testified that after he had turned in his job application for the new company, Quijano spoke to him at the conveyor belt as follows (Tr. 80):

He told me if I wanted to get hired by Adair I would have to sign a piece of paper saying that I would not want to go union if I get hired.

The two drivers refused to sign the petition. They were not hired. On the other hand, Mario Torres, another driver at ATD, testified that he did sign the petition and that he was promptly hired by Adair. Clearly, Wood and Quijano were acting in the interest of the Respondent and, as argued by the General Counsel, as agents for Adair Express. Their threats were not idle observations, but reflected Respondent's course of conduct. Obviously their jobs depended on the new company's successful operation. It is all the more apparent that the Respondent hired the drivers based upon their union identities, rather than the pretextual reasons contained in Foltz' testimony. Significantly, even after the Respondent discharged two drivers on January 10, 2000, and even after several of the new hires failed to report for work after January 11, 2000, the Respondent continued its rejection of the seven discriminatees. Having concluded that the Respondent's asserted business reasons were pretextual, I also find that the Respondent failed to satisfy its *Wright Line* burden of showing that it would not have hired the discriminatees even in the absence of their union sympathy. See *FES*, 331 NLRB No. 20, slip op. at 4 (2000).

Foltz testified that she considered the written applications, which most ATD drivers had submitted, and that she consulted with her managers in the selection process. Here are Respondent's asserted reasons for rejecting the seven former ATD drivers:

Roland Estrada. The Respondent refused to hire Roland Estrada, who, as the Respondent concedes, was the acknowledged leader of the union campaign. According to Foltz, she did not hire him, because he had no calls, no shows on his record with ATD, and I viewed him handling freight. It was atrocious to me. Foltz never interviewed Estrada, because she

didn't have a lot of time and, as she stated, [h]is work history speaks for itself (Tr. 557). Foltz admitted that she knew Estrada to be a strong union supporter. According to Wood, Estrada was a really incredible driver for 3 years, but his performance had deteriorated after the union campaign, when ATD decided to cancel the contract. Estrada's work record showed that over a 3-year period he had one accident, one suspension, and eight warnings, several of which he received after the commencement of the union campaign (R. Exh. 1).

Gary S. Bailey. Foltz refused to hire Gary Bailey because she had reviewed his driver's manifest, which showed eight mistakes, such as illegible signatures or no signatures at all. The manifest was the driver's record of daily deliveries. A customer is expected to sign and print the name on a manifest to show that the delivery had been made. Foltz further stated that she also relied on his ATD work history. His personnel record included two accidents, a customer complaint, a suspension, and several warnings, three of which were incurred after the commencement of the union campaign (R. Exh. 2). Wood's testimony was that Bailey had failed to download certain information in a timely manner and was therefore not considered.

Craig Smith. Smith was rejected, according to Foltz, because he made a terrible impression with [her], the first time [she] met him. . . . He was very disrespectful . . . and rude (Tr. 558). She also testified that she had been told that Smith was a prima donna who was pampered by one of the dispatchers and that she considered his work record as poor. His ATD record shows that he had incurred two minor traffic accidents in a 4-year period, received two warning notices and that he reported a dog bite and a back injury (R. Exh. 6). Wood testified that he didn't like Smith, but that he was a good driver.

Geraldo M. Lachica. Foltz rejected Lachica because his record with Airborne Express was not very good (Tr. 558). In his 2 years with ATD, he received five disciplinary warning notices, three of which occurred after the Union began its campaign. He had no record of accidents (R. Exh. 4). According to Wood, Lachica had an attendance problem.

Jofre Macoy. Foltz rejected Macoy because he needed a month off to go to the Philippines. She conceded that Macoy was a good driver who, according to Wood was about as close to perfect as you can get (Tr. 403). His ATD record shows that he had a nearly trouble-free work history for more than 4 years (R. Exh. 3). But Foltz declined even to interview Macoy.

Eddie Zamora. According to Foltz, he had an obvious serious problem with being late to work (Tr. 559). Quijano testified that he and Wood had strongly recommended Zamora, because he had a reputation as a really fast worker. His ATD work record shows that he had one accident and seven warning notices dealing with tardiness (R. Exh. 5).

Mario Rodriguez. According to the Respondent, Rodriguez was not hired because he had failed to submit an application. Yet Rodriguez testified that he had completed the application on January 5, and that he personally handed the application to Foltz during the pizza event on that day. Wood testified that Rodriguez had a bad attitude and made mistakes.

The record shows that the work histories of the ATD drivers who were hired by Adair Express were not superior and in some instances even worse, particularly considering their rela-

tively shorter tenure as ATD drivers. For example, Muhammad Shez Johanni's work record shows one accident and one warning during his employment with ATD of less than 1 year (R. Exh. 12). Michael Moore had incurred two warnings and one "management discussion" during his ATD employment of less than 1 year (R. Exh. 11). Henry A. Hernandez had incurred two accidents and a warning notice. He also had a DMV conviction on his record during his ATD employment of less than 2 years (R. Exh. 9). Charles Hernandez' work record shows two accidents, one incident of tardiness, and various DMV convictions in less than 2 years' employment with ATD. The two drivers, Mario Wilson Torres and Bobbie Varlera, who had been employed at ATD for only a few months had not yet accumulated any adverse job actions (R. Exhs. 10, 13).

Clearly, the Respondent's asserted reasons for its refusal to hire the prounion candidates are insincere and pretextual. I find Foltz' testimony, as well as the explanations of Wood and Quijano, not credible and in any case, unpersuasive. I conclude that the Respondent has failed to show that it would have rejected the discriminatees even in the absence of their union sympathies, particularly considering the Respondent's obvious difficulties with the retention of the employees who had no prior ATD experience. I accordingly find that the Respondent, as a successor employer, intentionally avoided recognizing and bargaining with the Union by discriminating in hiring to ensure that a majority of the employees in the new unit would not be employees of the predecessor. *Galloway School Lines*, 321 NLRB 1422, 1427 (1996). *Triple A Series*, 321 NLRB 873 (1996). Here, it is clear that Respondent's complement of employees consisted of 14 employees, including the 6 former ATD drivers (including Mario Torres who had voted for the Union and who had subsequently signed the antiunion petition). The Respondent's refusal to hire involved seven former ATD employees who, absent the Respondent's unlawful conduct, would have constituted a sufficient number of predecessor employees to assure the Union's majority status. In *Galloway*, supra at 1429, the Board stated as follows:

Therefore, because the Respondent unlawfully refused to hire certain of the predecessor's employees in order to avoid recognizing and bargaining with the Union, it is appropriate to find that the Respondent had a statutory obligation to adhere to the employment conditions of the collective bargaining agreement between the Union and Laidlaw from the initiation of its successor operation, and a statutory obligation to bargain with the Union before making changes in that status quo. We further find that the Respondent violated Section 8(a)(5) not only by refusing to recognize the Union as the majority representative of its employees, but by making unilateral changes in employment conditions without first bargaining with the Union. Finally, we find that the appropriate remedy for these 8(a)(5) violations is to require the Respondent to recognize and bargain with the Union, and to retroactively restore the terms and conditions of employment that existed under the predecessor's contract with the Union until such time as the Respondent and the Union bargain to agreement or to impasse, and to make whole the bargaining unit em-

ployees in a manner consistent with the contract's provisions.

The Respondent had made changes in the employment conditions, including changes in pay and benefits as of January 10, 2000. The Union filed its original charges on January 11, 2000, and made additional requests to bargain, on April 28 and May 11, 2000 (GC Exhs. 7, 9).

CONCLUSIONS OF LAW

1. Adair Express L.L.C. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Package & General Utility Drivers, Local No. 396, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent is a successor employer to Assured Transportation & Delivery, Inc. (ATD).

4. The following unit, constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time drivers employed by Adair Express L.L.C. at 15041 Keswick Street, Van Nuys, California.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

5. By failing and refusing to hire applicants because of their union affiliation, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By failing to recognize the Union and by failing and refusing to bargain collectively in good faith with the union as the exclusive collective-bargaining representative of its employees, The Respondent violated of Section 8(a)(5) and (1) of the Act.

7. By setting initial terms and conditions of employment for employees in the unit without bargaining with the Union, by, inter alia, decreasing wages, and changing benefits, the Respondent violated Section 8(a)(1) and (5) of the Act.

8. The Respondent's conduct described above constitutes unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated the National Labor Relations Act, as amended. I shall recommend that it cease and desist therefrom, and that it shall take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully and discriminatorily refused employment to certain former employees of Adair Express. I shall recommend that these following named employees: Craig Smith, Rolando Estrada, Jofre Macoy, Eddie Zamora, Gary Bailey, Gerardo Lachica, and Mario Rodriguez be offered immediate employment to the positions to which they applied or, if such positions, no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges; and if necessary, terminating the service of employees hired in their stead, and to make the aforesaid individuals whole for wage and benefit losses they

may have suffered by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent failed to recognize and bargain with the Union, a bargaining order is necessary prohibiting the Respondent from unilaterally setting the term and conditions of employment. Finally, it is necessary that the Respondent be ordered, on request of the Union, to rescind any changes in the employees' working conditions and make the employees whole.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Adair Express L.L.C., Van Nuys, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire job applicants because they participated in the Union's organizing program or because of their union affiliation, or otherwise discriminating against employees to avoid having to recognize and bargain with the Union.

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

Included: All full-time and regular part-time drivers employed by Adair Express L.L.C. at 15041 Keswick Street, Van Nuys, California.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

(c) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to the following employees of the predecessor, who would have been employed by the Respondent but for the illegal discrimination against them, employment as monitors in the Conventry operation, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. In addition, make whole these employees for any loss of earnings and other benefits they may have suffered by reason of the Respondent's

unlawful refusal to employ them. Backpay shall be computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950)), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

Craig Smith
Rolando Estrada
Jofre Macoy
Eddie Zamora
Gary Bailey
Gerardo Lachica
Mario Rodriguez

(b) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(c) On request of the Union, rescind any changes from terms and conditions of employment that existed immediately prior to the Respondent's takeover of the predecessor company restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from January 10, 2000, until it negotiates in good faith with the Union to agreement or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, supra.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Van Nuys, California location copies of the attached notice marked "Appendix".⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 10, 2000.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. June 18, 2001

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire job applicants because they participated in the Union's organizing prepare or because of this union affiliation or otherwise discriminating against employees to avoid having to recognize and bargain with the Union.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

Included: All full time and regular part-time drivers employed by Adair Express L.L.C. at 15041 Keswick Street, Van Nuys, California.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the following employees of the predecessor, who would have been employed by us but for our illegal discrimination against them, employment as monitors in our Conventry operation, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. In addition, WE WILL make whole these employees for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them, with interest.

Craig Smith
Rolando Estrada
Jofre Macoy
Eddie Zamora
Gary Bailey
Gerardo Lachica
Mario Rodriguez

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed document.

WE WILL, on request of the Union, rescind any changes from terms and conditions of employment that existed immediately prior to our takeover of the predecessor's retroactively restoring preexisting terms and conditions of employment, including wage rates and benefits plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about September 1, 1991, until we negotiate in good faith with the Union to agreement or to impasse.

ADAIR EXPRESS L.L.C.